No. 2444.

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT, DISTRICT OF CALIFORNIA

MAX STEINFELDT,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Opening Brief of Plaintiff in Error

P. S. EHRLICH,
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By ..... Deputy Clerk.

THE TEN BOSCH COMPANY, SAN FRANCISCO

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Brief for Appellant.

Plaintiff in error, Max Steinfeldt, was convicted of an alleged violation of the Act of February 9, 1909, Chapter 100, 35 Stat. L., Sec. 614.

The claims urged by plaintiff in error and which are covered by proper exceptions and assignments of error, are as follows:

I.

THE ACT OF FEBRUARY 9, 1909, 35 STAT. AT L., 614, IS UNCONSTITUTIONAL AS BEING

AN EXERCISE BY CONGRESS OF THE POLICE POWER RESERVED TO THE STATES.

"1. That the Act of February 9th, 1909, Chapter 100, 35 Statutes at Large, 614, the second section thereof, given in the words 'or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium, or *preparation* or *derivative thereof after importation,* knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars or by imprisonment for any time not exceeding two years, or both,' is contrary to the Fifth Amendment to the Constitution of the United States, in that it deprives the defendants of life and liberty without due process of law." (See Assignments of Error, Trans. p. 10.)

"2. That the Act of February 9th, 1909, Chapter 100, 35 Statutes at Large, 614, the second section thereof, given in the words, 'or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation, or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both,' is contrary to the Tenth Amendment to the Constitution of the United States, in that it is an assumption by Congress of powers not delegated to the United States by the Constitution." (Trans. p. 11.)

"3. That the Act of February 9th, 1909, Chapter 100, 35 Statutes at Large, 614, the second section thereof, given in the words 'or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both,' is contrary to the Tenth Amendment of the Constitution of the United States, in that it is an assumption by Congress of powers reserved to the States respectively, or to the people." (Trans. p. 11.)

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"6. That the indictment is contrary to Article 1, section 8, of the Constitution of the United States, in that it does not come within the powers of Congress enumerated in Section 8, of Article 1, and is not a law necessary or proper to carry into execution such powers." (Trans. p. 12.)

"7. That the said acts charged in the indictment do not constitute a public offense against the laws of the United States." (Trans. p. 13.)

"8. That the indictment fails to show that the Court has any jurisdiction over the alleged acts as to subject matter." (Trans. p. 13.)

"9. That the indictment fails to show that the Court has any jurisdiction over the alleged acts as to persons." (Trans. p. 13.)

"10. That the indictment does not state facts sufficient to constitute a public offense against the laws of the United States." (Trans. p. 13.)

A.

The Indictment.

The indictment (Trans. p. 2) was presented and filed June 20, 1913, and charges that on the 3rd day of March, 1913, plaintiff in error, Max Steinfeldt, "did then and there, wilfully, fraudulently and knowingly, receive and conceal one can of opium, prepared for smoking purposes, which the said Max Steinfeldt then and there knew *had been imported* into the United States contrary to law."

B.

The Evidence.

The evidence in this case shows that the plaintiff in error was caught by government officials with opium in his possession, at the Argyle Apartments, No. 146 McAllister Street, in the City and County of San Francisco. The evidence further shows that the opium had been left at the office in the lobby of the hotel, and that upon coming into the apartment house Steinfeldt had taken the package from the lobby and was about to take it to his room when arrested. (Trans. p. 26.)

The testimony further shows that it was smoking opium (Trans. pp. 30-31), and not brought in for medicinal purposes. The evidence (Trans. pp. 36 to 38) merely shows acts committed in the hotel building at No. 146 McAllister Street, San Fran-

cisco, and in no wise connected with the unlawful importation. The claim of the plaintiff in error is that

THE SECTION OF THE ACT OF CONGRESS HERE INVOLVED IS UNCONSTITUTIONAL:

A. IN THAT IT IS AN INTERFERENCE WITH THE POLICE POWER RESERVED TO EACH INDIVIDUAL STATE;

B. IN THAT IT IS AN EXERCISE OF A POWER NOT GRANTED CONGRESS BY THE CONSTITUTION.

This case presents a clear issue as to the constitutionality of that section of the opium statute which reads as follows:

> "SEC. 2. (PENALTY FOR VIOLATION —POSSESSION, PROOF OF GUILT.) That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, *or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both.* Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative there-

> of, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."

The first part of this section, making it a criminal offense against the Federal laws to import or bring, or to assist in the bringing in, of opium into the United States, is undoubtedly constitutional, under the commerce clause in the Constitution.

The second part of the section above quoted, and in particular the part herein quoted, to-wit:

> "* * * or shall *receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation,* knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both."

is undoubtedly an assumption by Congress of the police power of the individual State. We have here a statute of Congress punishing a person, whether he be the twentieth person to handle such opium unlawfully imported, and whether it be opium, or any preparation or derivative thereof, and in any shape or form, irrespective of whether or not such person had any part, or assisted at all, in the unlawful importation. In fact, the section here involved limits its application to opium AFTER IMPORTATION by its own phrase-

ology. In other words, any person in the City of San Francisco, who has smoking opium in his home in any shape or form, knowing the same to have been unlawfully imported, but having nothing to do with the unlawful importation thereof, is subject to arrest by the Federal government.

To take an analogous case: It is now made a criminal offense to import aigrettes into the United States. If this part of the section of the Act of Congress in respect to opium is constitutional, then any woman wearing an aigrette, knowing such aigrette to have been unlawfully imported, is subject to arrest by the Federal government, in spite of the fact that she has taken no part at all in the importation of such aigrettes. If this Act be constitutional, there is no limitation to the power of the Federal Government in its interference with the police power in respect to the morals, the public health and welfare of the citizens of each and every individual State. Yet it has been axiomatic and fundamental in our theory of government that the police power in respect to the public health, morals and social welfare of the citizens of each and every individual State is solely and exclusively for that particular State. This principle of law that the Federal Government cannot interfere with the police power of the individual State is so axiomatic that a long citation of cases is unnecessary, and the mere statement of the rule is sufficient. The only question, therefore, is as to whether or not the statute comes within the purview of this

rule, and is not authorized, if it does come, as an exercise of the commerce power of Congress.

Before citing authorities applicable to the case, we would call to the Court's attention that a duty rests upon this court to declare this Act unconstitutional, if the Court should deem it to be such, and that in order to declare the Act of Congress herein referred to constitutional, it must have its warrant and justification in the powers granted to Congress by the Constitution.

In *United States* vs. *Scott,* 148 Federal, 432, in discussing the question of the unconstitutionality of a statute of the United States, the Court said:

> "Certain other elementary and well-understood propositions may also be noted at this point. First. Unless congressional legislation be supported by constitutional authority, it cannot be supported at all. The rule in this respect is different from the rule applicable to State legislation, which is usually valid unless expressly forbidden. In other words, congressional legislation must have warrant in the language of the Constitution, while State legislation may be valid unless expressly prohibited.
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> Third. But, if the unconstitutionality of an act is demonstrated, the courts of the United States, whether the highest or the lowest, of them, and especially the former, have not hesitated so to decide. The well-established rule for our guidance in such cases is stated by Chief Justice Fuller in *Pollock* vs. *Farmers' Loan & Trust Co.,* 157 U. S., at page 554, 15 Sup. Ct. at page 679 (39 L. Ed., 759), as follows:

> " 'Necessarily, the power to declare a law unconstitutional is always exercised with reluctance, but the duty to do so, in a proper case, cannot be declined, and must be discharged in accordance with the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question.' "

We would also call to the Court's attention that not only does this section here involved, by its very terms as stated above, operate only after the unlawful importation, but the facts of this case fall within the rule in *United States* vs. *Caminata,* 194 Fed., 905, where the Court said:

> "The offense described in section 2 is committed whenever smoking opium is fraudulently and knowingly brought by an offender within the territorial limits of the United States. The offense is then completed, although the opium may not have been landed from a ship or have been carried across the custom lines."

That the opium statute is in part unconstitutional has been predetermined in the case of *United States* vs. *Keller,* 213 U. S. 138, 53 L. ed. 737, by inferential reasoning. In that case that part of a statute practically identical in its terms with the section of the opium statute in question here, was held unconstitutional. The analogy between the two cases is so immediate and direct that we will quote to the Court both statutes:

"Sec. 3. That the importation into the United States of alien woman or girl for the purpose of prostitution, or for any other immoral purpose, is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, OR WHOEVER SHALL KEEP, MAINTAIN, CONTROL, SUPPORT OR HARBOR N ANY HOUSE OR OTHER PLACE FOR THE PURPOSE OF PROSTITUTION, OR FOR ANY OTHER IMMORAL PURPOSE, ANY ALIEN WOMAN OR GIRL, WITHIN THREE YEARS AFTER SHE SHALL HAVE ENTERED THE UNITED STATES, SHALL, IN EVERY SUCH CASE, BE DEEMED GUILTY OF A FELONY, *and, on conviction thereof, be imprisoned not more than five years, and pay a fine of not more than five thousand dollars;* and any alien woman or girl who shall be found an inmate of a house of prostitution, or practising prostitution, at any time within three years after she shall have entered the United States, *shall be deemed to be unlawfully within the United States, and shall be deported* as provided by sections twenty and twenty-one of this act. (34 Stat. at L. 898, 899, chap. 1134.)

"Sec. 1. That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof; *Provided,* That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law.

"Sec. 2. That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or *derivative thereof contrary to* law, OR SHALL RECEIVE, CONCEAL, BUY, SELL, OR IN ANY MANNER FACILITATE THE TRANSPORTATION, CONCEALMENT, OR SALE OF SUCH OPIUM OR PREPARATION OR DERIVATIVE THEREOF AFTER IMPORTATION, KNOWING THE SAME TO HAVE BEEN IMPORTED CONTRARY TO LAW, SUCH OPIUM OR PREPARATION OR DERIVATIVE THEREOF *shall be forfeited and shall be destroyed and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both.* Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

In that case it was held that that section of the Act prohibiting the importation of alien females for

immoral purposes was constitutional, but that section which makes it a Federal offense to keep, maintain, control, support, or harbor in any house or place for immoral purposes any alien woman after importation was held to be unconstitutional, as being beyond the power of Congress, and an invasion of the police power of the individual State. To quote from the decision of Chief Justice Brewer:

> "The plaintiffs in error were indicted for a violation of this section, the charge against them being based upon that portion of the section which is in italics, and, in terms, that they 'wilfully and knowingly did keep, maintain, control, support and harbor in their certain house of prostitution,' (describing it), 'for the purpose of prostitution, a certain alien woman, to-wit, Irene Bodi,' who was, as THEY WELL KNEW, a subject to the King of Hungary, who had entered the United States within three years. A trial was had upon this indictment; the plaintiffs in error were convicted and sentenced to the penitentiary for eighteen months." Judgment reversed.
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> "As to the suggestion that Congress has power to punish *one assisting in the importation* of a prostitute, it is enough to say that the statute does not include such a charge. The indictment does not make it; and the testimony shows without any contradiction, that the woman Irene Bodi came to this country in November, 1905; that she remained in New York until October, 1907; then came to Chicago, and went into the house of prostitution which the defendants purchased in November, 1907, finding the woman then in the house; that she had

been in the business of a prostitute only about ten or eleven months prior to the trial of the case in October, 1908, and that the defendants did not know her until November, 1907. In view of those facts, the question of the power of Congress to punish those who *assist in the importation* of a prostitute is entirely immaterial.

"THE ACT CHARGED IS ONLY ONE INCLUDED IN THE GREAT MASS OF PERSONAL DEALINGS WITH ALIENS. IT IS HER OWN CHARACTER AND CONDUCT WHICH DETERMINE THE QUESTION OF EXCLUSION OR REMOVAL. THE ACTS OF OTHERS MAY BE EVIDENCE OF HER BUSINESS AND CHARACTER. BUT IT DOES NOT FOLLOW THAT CONGRESS HAS THE POWER TO PUNISH THOSE WHOSE ACTS FURNISH EVIDENCE FROM WHICH THE GOVERNMENT MAY DETERMINE THE QUESTION OF HER EXPULSION. EVERY POSSIBLE DEALING OF ANY CITIZEN WITH THE ALIEN MAY HAVE MORE OR LESS INDUCED HER COMING. BUT CAN IT BE WITHIN THE POWER OF CONGRESS TO CONTROL ALL THE DEALINGS OF OUR CITIZENS WITH RESIDENT ALIENS? IF *THAT BE POSSIBLE, THE DOOR IS OPEN TO THE ASSUMPTION BY THE NATIONAL GOVERNMENT OF AN ALMOST UNLIMITED BODY OF LEGISLATION.*

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"That there is a moral consideration in the facts of this case, that the act charged is within the scope of the police power, is immaterial, for, as stated, there is in the Constitution no grant to Congress of the police power. And the legis-

lation must stand or fall according to the determination of the question of the power of Congress to control generally dealings of citizens with aliens. In other words, an immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the States, may be taken by Congress away from them. Although Congress has not largely entered into this field of legislation, it may do so, if it has the power, THEN WE SHOULD BE BROUGHT FACE TO FACE WITH SUCH A CHANGE IN THE INTERNAL CONDITIONS OF THIS COUNTRY AS WAS NEVER DREAMED OF BY THE FRAMERS OF THE CONSTITUTION.

"While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that *prohibitions and limitations upon these powers should also be fairly and reasonably enforced. Fairbank* vs. *United States,* 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648. *To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system.* We should never forget the declaration in *Texas* vs. *White,* 7 Wall. 700, 725, 19 L. ed. 227, 237, that "the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

No distinction in reason, law or logic exists between this case and the case at bar, other than that the opium statute makes it essential that the offender know that such opium was unlawfully imported. But this is no valid distinction, as knowledge of the unlawful importation cannot give to Congress powers not granted by the Constitution. Mere

knowing or not knowing of an offense against the government cannot create Federal power, where without such knowledge it is clear no such offense could exist.

The familiar argument was made by the Government in this Keller case, as is contended in this case, that the Act restrains an evil with reference to which it has been universally held that Congress has the power to legislate, and if this be so, then this provision falls within the purview of Congressional legislation, and is valid, as an exercise of the implied power under the commerce clause, notwithstanding the fact, clearly admitted, that each State has the power to punish this offense. The Court clearly answers this argument in the language quoted above.

Admittedly, if this was an exercise of the revenue law, and an attempt to collect duty upon imports—in other words, if Congress was acting in an endeavor to enforce the revenue statutes—the act would be clearly constitutional; but there is not the slightest question here but that the act referred to is not passed under the guise of an endeavor to aid the collection of revenue, which it must be conceded the United States has the right to do, or of any of the constitutional powers of Congress. Thus by analogous reasoning, since the Court held in the Keller case that it was beyond the power of Congress to legislate concerning the morals of alien women within the United States, although such legislation might aid the Federal Government in a

power exclusively within its domain, viz.: the immigration of aliens, then this section of the opium statute at issue here, although it might aid the Federal Government in its power to exclude articles of commerce from the United States, must be held unconstitutional in so far as it punishes those found with opium in their possession within any States after importation has ended. As in the Keller case, so here, the fact that it might aid in the exclusion of opium from the United States, is insufficient to sanction an invasion of the power reserved to the States, and not granted by the commerce clause.

In the case of Ex Parte Lair, 177 Fed., 790, the Court said:

> "It is conceded on the part of the United States attorney, representing the government, that, in so far as the last three counts of the indictment are concerned, the judgment or sentence is invalid and void, as held by the Supreme Court in the cases of *Keller* vs. *United States* and *Ullman* vs. *United States,* 213 U. S. 138, 29 Sup. Ct. 470, 53 L. Ed. 737, for the reason that the offense against public morals, for holding a person in a house of prostitution, pertains to the police power of the State, and it is not within the competency of Congress to regulate or prohibit the same.
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> "When this indictment was found and the judgment of conviction was entered herein, the cases of Keller vs. United States and Ullman vs. United States, *supra,* had not been decided, holding that the regulation and prevention of the holding and keeping of a woman for the im-

> moral purpose of prostitution was within the exclusive police power of the respective States and was not delegated by the Constitution to Congress."

No comment is necessary.

In *U. S.* vs. *Westman,* 182 Fed. 1017, the Court said:

> "The case of *Keller* vs. *United States,* 213 U. S. 138, 29 Sup. Ct. 470, 53 L. Ed. 737, is cited in support of the first objection. That was a case involving the keeping, harboring and maintenance of a woman wholly within the confines of a single State for the purpose of prostitution, and it was held that the matter was one for the police regulations of the State. SUCH IS NOT THE CASE HERE, AS ALL THE COUNTS ARE BASED UPON THE ACT OF TRANSPORTATION, OR CAUSING TO BE TRANSPORTED, OR AIDING OR ASSISTING IN THE TRANSPORTATION BY THE PURCHASE OR SUPPLYING WITH TICKETS THEREFOR, ETC., FROM ONE STATE INTO ANOTHER; THE SAID TRANSPORTATION BEING FOR SOME UNLAWFUL PURPOSE DENOUNCED BY THE LAW. Hence, the local feature of the criticisms is eliminated, and the indictment should stand as against the objection."

The only other possible distinction between the case at bar and the cases above cited, and particularly the Keller case, is that in one we have Congress legislating as to persons, and in the other as to things, but no logical distinction can rest in such superficial reasoning.

The Court, in the case of *Hoke* vs. *United States,* 227 U. S. 322, 57 L. Ed. 927, in discussing the constitutionality of the statute preventing interstate commerce in women, said, in respect to this distinction:

> "Commerce among the States, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property; that is, a person may move or be moved in interstate commerce. The power to regulate each of these is identical, both as to its source and its extent.
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> "Of course it will be said that women are not articles of merchandise, but this does not affect the analogy of the cases; the substance of the congressional power is the same, only the manner of its exercise must be accommodated to the difference in its objects."

In the case of *United States* vs. *Gould,* Number 15, 239, 25 Federal Cases 1375, the Court declared an act of Congress unconstitutional which prohibited the keeping of slaves in any particular State knowing them to have been unlawfully imported, although the first section of the act prohibiting the importation of slaves was held constitutional. The case is so analogous and so directly in point that no comment thereon is necessary, and we would call the Court's particular attention thereto. We quote at length therefrom:

"It is settled, by repeated decisions of the Supreme Court, that the commercial power of the general government extends to and covers (exclusively of the interference of State laws) the importation of either goods or persons, until the *commercial transaction of importation is complete and ended, and no further.* When the goods or persons imported pass out of the possession or control of the importer, his agents and employees, and become mingled with the mass of property or population of a State, they then become subject to the State jurisdiction and laws."

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"Judge McLean, one of the majority, in the Passenger Cases, 7 How. (48 U. S.) 467, said:

"'When the merchandise is taken from the ship, and becomes mingled with the property of the people of the State like other property *it is subject to the local law;* but until this shall take place, the merchandise is an import, *and is not subject to the taxing power of the State,* and the same rule applies to passengers. When they leave the ship, and *mingle with the citizens of the States,* they become subject to its laws.'

"This case shows, referring to the Passenger Cases, 7 How., 48 U. S. 405, then, that in this respect, the same principle applies to the importation of *both goods and persons;* that is, that until the *commercial transaction of the importation is complete and ended,* they are subject to the commercial power and laws of the United States; but when the *commercial transaction of importation* is complete and ended, and the goods become mingled with the property, and the persons with the people of a State, *they both then become subject to the State jurisdiction* and State laws. It obviously makes no difference that the persons are negroes, and in-

tended by the importer as slaves. Whether they are to be considered as slaves or free, as chattels or persons, the same principle applies to them. The cases referred to show the extent and limit of this power over foreign commerce. It covers and extends to the whole commercial transaction of importation; and, in respect to negroes unlawfully imported as slaves, to their removal out of the country. This is its extent and its limit. In my opinion, it never was the intention of the framers of the Constitution that the several States should surrender to the general government this power to fix the status, prescribe the rights and provide for the protection of free negroes, or any other inhabitants of a State. Suppose that a negro, *unlawfully imported, is residing in Alabama, either as a freeman, or wrongfully held as a slave, and that any person should beat, maim or murder such negro in Alabama, what law would be violated, and under what law could the offender be tried and punished? Most unquestionably the State law.* So, too, if he is wrongfully deprived of his freedom, it is the State law which is violated, and the State law under which the offender is to be punished. *Such an offense has no connection with, or relation to foreign commerce, and is entirely without and beyond the power given to Congress over any branch of foreign commerce.* * * *

"UNDER THE CONSTRUCTION WHICH I GIVE TO THE LAW, THE INDICTMENT IN THIS CASE IS NOT MAINTAINABLE. IT DOES NOT ALLEGE THAT THE ACCUSED HAD ANY CONNECTION WHATEVER WITH THE *UNLAWFUL IMPORTATION;* NOR DOES IT ALLEGE ANY FACTS FROM WHICH THIS COULD BE LEGALLY INFERRED. IT SIMPLY ALLEGES THAT THE AC-

CUSED *KNOWINGLY HELD,* AS A SLAVE, IN ALABAMA, A NEGRO, WHO HAD PREVIOUSLY BEEN UNLAWFULLY IMPORTED, BY SOME OTHER UNKNOWN PERSON. THIS, I THINK, IS NOT AN INDICTABLE OFFENSE, UNDER THE CONSTITUTIONAL LAWS OF THE UNITED STATES."

It is necessary to cite only a few cases to the effect that the State has the power, and the exclusive power, to regulate vice and morality, and public health, and to pass the necessary laws for the protection of its citizens with reference thereto.

In the celebrated License Cases, 5 Howard 504, the Court said:

> "It is possible, that, under our system of double governments over one and the same people, the States cannot prohibit the mere arrival of vessels and cargoes which they may deem dangerous in character to their public peace, or public morals, or general health. This might, perhaps, trench on foreign commerce. Nor can they tax them as imports. This might trench on that part of the constitution which forbids States to lay duties on imports. But after articles have come within the territorial limits of the States, whether on land or water, the destruction *itself of what contains* disease and death, and the *longer continuance* of such articles within their limits, or the terms and conditions of their continuance, when conflicting with *their legitimate police, or with their power over internal commerce,* or with their right of taxation over all persons and property under their protection and jurisdiction, seems one of

the first principles of State sovereignty, and indispensable to public safety."

In *Mugler* vs. *State of Kansas*, 123 U. S. 623, 31 L. Ed. 205, the Court said:

"This conclusion is unavoidable, unless the fourteenth amendment of the Constitution takes from the States of the Union those powers of police that were reserved at the time the original constitution was adopted. But this Court has declared, upon full consideration, in *Barbier* vs. *Connolly,* 113 U. S. 31, that the fourteenth amendment had no such effect. After observing, among other things, that that amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the Court said: 'But neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed "its police power," to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.' Undoubtedly the State, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government. *Henderson* vs. *Mayor of New York,* 92 U. S. 259; *Railroad Co.*

vs. *Husen,* 95 U. S. 465; *Gas-Light Co.* vs. *Light Co.,* 115 U. S. 650; 6 Sup. Ct. Rep. 252; *Walling* vs. *Michigan,* 116 U. S. 446; 6 Sup. Ct. Rep. 454; *Yick Wo.* vs. *Hopkins,* 118 U. S. 356; 6 Sup. Ct. Rep. 1064; *Steam-Ship Co.* vs. *Board of Health,* 118 U. S. 455, 6 Sup. Ct. Rep. 1114."

To this effect, see also the celebrated case of *Patterson* vs. *Kentucky,* 97 U. S. 501.

In *U. S.* vs. *Reese,* 92 U. S. 220, the Court said:

"We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad *enough to cover wrongful acts without as well as within the constitutional jurisdiction,* can be limited by judicial construction so *as to make it operate only* on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. WE ARE NOT ABLE TO REJECT A PART WHICH IS UNCONSTITUTIONAL, AND RETAIN THE REMAINDER, BECAUSE IT IS NOT POSSIBLE TO SEPARATE THAT WHICH IS UNCONSTITUTIONAL, IF THERE BE ANY SUCH, FROM THAT WHICH IS NOT. THE PROPOSED EFFECT IS NOT TO BE ATTAINED BY STRIKING OUT OR DISREGARDING WORDS THAT ARE IN THE SECTION, BUT BY INSERTING THOSE THAT ARE NOT NOW THERE. EACH OF THE SECTIONS MUST STAND AS A WHOLE, OR FALL TOGETHER. THE LANGUAGE IS PLAIN. THERE IS NO ROOM FOR CONSTRUCTION, UNLESS IT BE AS TO THE EFFECT OF THE CONSTITUTION. THE QUESTION, THEN, TO BE DETERMINED IS,

WHETHER WE CAN INTRODUCE WORDS OF LIMITATION INTO A PENAL STATUTE SO AS TO MAKE IT SPECIFIC, WHEN, AS EXPRESSED, IT IS GENERAL ONLY.

"IT WOULD CERTAINLY BE DANGEROUS IF THE LEGISLATURE COULD SET A NET LARGE ENOUGH TO CATCH ALL POSSIBLE OFFENDERS, AND LEAVE IT TO THE COURTS TO STEP INSIDE AND SAY WHO COULD BE RIGHTFULLY DETAINED, AND WHO SHOULD BE SET AT LARGE. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. *Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people.*"

In this connection we would call the Court's attention to the case of *Illinois C. R. Co.* vs. *McKendree,* 203 U. S. 544, 51 L. Ed. 398, in which the Court said:

"The terms of order 107 apply to all cattle transported from the south of this line to parts of the United States north thereof. It would, therefore, include cattle transported within the State of Tennessee from the south of the line as well as those from outside that State; there is no exception in the order, and in terms it includes all cattle transported from the south of

the line, whether within or without the State of Tennessee. It is urged by the Government that it was not the intention of the Secretary to make provision for intrastate commerce, as the recital of the order shows an intention to adopt the State line, when the State by its legislature has passed the necessary laws to enforce the same completely and strictly. But the order in terms applies alike to interstate and intrastate commerce. A party prosecuted for violating this order would be within its terms if the cattle were brought from the south of the line to a point north of the line within the State of Tennessee. It is true the Secretary recites that legislation has been passed by the State of Tennessee to enforce the quarantine line, but he does not limit the order to interstate commerce coming from the south of the line, and, as we have said, the order in terms covers it. We do not say that the State line might not be adopted in a proper case, in the exercise of Federal authority, if limited to its effect to interstate commerce coming from below the line, but that it is not the present order, and we must deal with it as we find it. NOR HAVE WE THE POWER TO SO LIMIT THE SECRETARY'S ORDER AS TO MAKE IT APPLY ONLY TO INTERSTATE COMMERCE, WHICH IT IS URGED IS ALL THAT IS HERE INVOLVED. FOR AUGHT THAT APPEARS UPON THE FACE OF THE ORDER, THE SECRETARY INTENDED IT TO APPLY TO ALL COMMERCE, AND WHETHER HE WOULD HAVE MADE SUCH AN ORDER, IF STRICTLY LIMITED TO INTERSTATE COMMERCE, WE HAVE NO MEANS OF KNOWING. THE ORDER IS IN TERMS SINGLE AND INDIVISIBLE.

In 100 U. S. 98, Trade-Mark Cases, the Court said:

"It was urged, however, that the general description of the offense included the more limited one, and that the section was valid where such was in fact the cause of denial. But the Court said, through the Chief Justice: 'We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is constitutional if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not there now. Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

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"To limit this statute in the manner now *asked for would be to make a new law,* not to *enforce an old one.* This is no part of our duty. If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were not before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the Act of Congress, and in others under State law. *Cooley, Const. Lim.* 178, 179; *Commonwealth* vs. *Hitchings,* 5 Gray (Mass.) 482."

In *Howard* vs. *Illinois Central R. Co.,* 207 U. S. 463, 52 L. Ed. 297, the Court, in speaking of the Employers' Liability Statutes as applied to railroads, said in part:

> "The Act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce.
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> "It remains only to consider the contention which we have previously quoted, that the Act is constitutional although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely State concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. IT IS APPARENT THAT IF THE CONTENTION WERE WELL FOUNDED IT WOULD EXTEND

THE POWER OF CONGRESS TO EVERY CONCEIVABLE SUBJECT, HOWEVER INHERENTLY LOCAL, WOULD OBLITERATE ALL THE LIMITATIONS OF POWER IMPOSED BY THE CONSTITUTION, AND WOULD DESTROY THE AUTHORITY OF THE STATES AS TO ALL CONCEIVABLE MATTERS WHICH, FROM THE BEGINNING, HAVE BEEN, AND MUST CONTINUE TO BE, UNDER THEIR CONTROL SO LONG AS THE CONSTITUTION ENDURES.

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"Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution and nonenforceable; and the judgments below are, therefore, affirmed."

In *New York* vs. *Miln,* 11 Peters 102, it was held that a State statute requiring a report from the master of a vessel, of the name, age, place of birth and last legal settlement of each passenger is not a regulation of commerce, but of police, and is an exercise of a power which rightfully belongs to the State, as the operation of the law only begins when the rights of Congress to enact a law end. The Court said in part:

"We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable

and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive."

In *Abby Dodge* vs. *United States,* 223 U. S. 166, 56 L. Ed. 393, the Court, in holding that the Act of Congress making it unlawful to land, deliver, cure or offer for sale at any port or place in the United States sponges taken from the waters of the Gulf of Mexico or the Straits of Florida could only be constitutional if applied to sponges taken outside the territorial limits of a State, and that any other interpretation would plainly render the statute unconstitutional as an excess of the powers of Congress for the taking of sponges from land under the waters within a State territorial limit is not subject to control of Congress, said:

"As, *by the interpretation* which we have

given the statute, its *operation is confined to the landing of sponges taken outside* of the territorial *limits of a State,* and the libel does not so charge,—that is, its averments do not negative the fact that the sponges may have been taken from waters within the territorial limits of a State,—it follows that the libel failed to charge an element essential to be alleged and proved, in order to establish a violation of the statute. *United States* vs. *Britton,* 107 U. S. 655, 661, 662, 27 L. Ed. 520, 522, 523, 2 Sup. Ct. Rep. 512, and cases cited.

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"In view of the paramount authority of Congress over foreign commerce, through abundance of precaution we say that nothing in this opinion implies a want of power in Congress, when exerting its absolute authority to prohibit the BRINGING OF MERCHANDISE, the subject of such commerce, INTO THE UNITED STATES, to cast upon one seeking to bring in the merchandise, the burden, if an exemption from the operation of the statute is claimed, of establishing a right to the exemption."

Gutierrez, 215 U. S. 87, 54 L. Ed., the Court, in discussing the Employers' Liability Statute of Congress, said:

"A perusal of the section makes it evident that Congress is here dealing, first with trade or commerce in the District of Columbia and the territories; and, second, with interstate commerce, commerce with foreign nations, and between the territories and the States. As we have already indicated, its power to deal with trade or commerce in the District of Columbia

> and the territories does not depend upon the authority of the interstate commerce clause of the Constitution. Upon the other hand, the regulation sought to be enacted as to commerce between the States and with foreign nations depends upon the authority of Congress granted to it by the Constitution to regulate commerce among the States and with foreign nations. As to the latter class, Congress was dealing with a liability ordinarily governed by State statutes, or controlled by the common law as administered in the several States. THE FEDERAL POWER OF REGULATION WITHIN THE STATES IS LIMITED TO THE RIGHT OF CONGRESS TO CONTROL TRANSACTIONS OF INTERSTATE COMMERCE; IT HAS NO AUTHORITY TO REGULATE COMMERCE WHOLLY OF A DOMESTIC CHARACTER. It was because Congress had exceeded its authority in attempting to regulate the second class of commerce named in the statute that this court was constrained to hold the act unconstitutional. The act undertook to fix the liability as to "any employee," whether engaged in interstate commerce or not; and, in the terms of the Act, had so interwoven and blended the regulation of liability within the authority of Congress with that which was not that the whole Act was held invalid in this respect."

It is evident that, although Congress may legislate concerning opium under the commerce power, and exclude opium from the United States, and may enact laws seeking to make effective this exclusion, yet there is a limit to which the power of Congress extends. As in these cases just quoted, although Congress in its absolute and exclusive control of inter-

state commerce may pass a Federal Employers' Liability Law, yet if such law acts not only upon interstate commerce but upon intrastate commerce, it must be held unconstitutional. And so, although the power of Congress to exclude opium comes under the commerce power, yet in determining whether or not the Act in question is constitutional, it must be recognized that the commerce power of Congress is limited to its particular sphere of interstate and foreign commerce.

It is the contention of the Government that this commerce power of Congress which prohibits the carrying of obscene literature and articles designed for indecent and immoral purposes from one State to another, and suppresses the lottery traffic, traffic in adulterated foods, and passes anti-trust laws, live stock laws, meat inspection and quarantine laws, etc., will also justify the constitutionality of the opium statute herein referred to. But it cannot be too clearly emphasized that those Acts held to be constitutional have been held to be so only insofar as they affected interstate commerce, and not intrastate commerce; and in every particular instance where the power of Congress has been exercised so as to indiscriminately affect INTRA as WELL as INTERSTATE commerce, the Acts have been held unconstitutional.

In the celebrated case of *Champion* vs. *Ames*, 188 U. S. 321, 47 L. Ed. 492, known as the Lottery Case, the Court clearly and most emphatically recognizes this contention, namely: that the power to prohibit lotteries extends only so far as interstate commerce

is concerned, and cannot interfere with internal affairs of any State. To quote from Judge Harlan, who wrote the opinion:

> "If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another?
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> "BESIDES, CONGRESS, BY THAT ACT, DOES NOT ASSUME TO INTERFERE WITH TRAFFIC OR COMMERCE IN LOTTERY TICKETS CARRIED ON EXCLUSIVELY WITHIN THE LIMITS OF ANY STATE, BUT HAS IN VIEW ONLY COMMERCE OF THAT KIND AMONG THE SEVERAL STATES. IT HAS NOT ASSUMED TO INTERFERE WITH THE COMPLETELY INTERNAL AFFAIRS OF ANY STATE, AND HAS ONLY LEGISLATED IN RESPECT OF A MATTER WHICH CONCERNS THE PEOPLE OF THE UNITED STATES. AS A STATE MAY, FOR THE PURPOSE OF GUARDING THE MORALS OF ITS OWN PEOPLE, FORBID ALL SALES OF LOTTERY TICKETS WITHIN ITS LIMITS, SO CONGRESS, FOR THE PURPOSE OF GUARDING THE PEOPLE OF THE UNITED STATES AGAINST THE 'WIDESPREAD PESTILENCE OF LOTTERIES, AND TO PROTECT THE COMMERCE WHICH CONCERNS ALL THE STATES, MAY PRO-

HIBIT THE CARRYING OF LOTTERY TICKETS FROM ONE STATE TO ANOTHER. IN LEGISLATING UPON THE SUBJECT OF THE TRAFFIC IN LOTTERY TICKETS, AS CARRIED ON THROUGH INTERSTATE COMMERCE, CONGRESS ONLY SUPPLEMENTED THE ACTION OF THOSE STATES—PERHAPS, ALL OF THEM—WHICH, FOR THE PROTECTION OF THE PUBLIC MORALS, PROHIBIT THE DRAWING OF LOTTERIES, AS WELL AS THE SALE OR CIRCULATION OF LOTTERY TICKETS, WITHIN THEIR RESPECTIVE LIMITS. IT SAID, IN EFFECT, THAT IT WOULD NOT PERMIT THE DECLARED POLICY OF THE STATES, WHICH SOUGHT TO PROTECT THEIR PEOPLE AGAINST THE MISCHIEFS OF THE LOTTERY BUSINESS, TO BE OVERTHROWN OR DISREGARDED BY THE AGENCY OF INTERSTATE COMMERCE. WE SHOULD HESITATE LONG BEFORE ADJUDGING THAT AN EVIL OF SUCH APPALLING CHARACTER, CARRIED ON THROUGH INTERSTATE COMMERCE, CANNOT BE MET AND CRUSHED BY THE ONLY POWER COMPETENT TO THAT END, BECAUSE CONGRESS ALONE HAS THE POWER TO OCCUPY, BY LEGISLATION, THE WHOLE FIELD OF INTERSTATE COMMERCE.

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"We decide nothing more in the present case than that the lottery tickets are subjects of traffic among those who choose to sell or buy them; that THE CARRIAGE OF SUCH TICKETS BY INDEPENDENT CARRIERS FROM ONE STATE TO ANOTHER IS THERE-

FORE INTERSTATE COMMERCE: THAT UNDER ITS POWER TO REGULATE COMMERCE AMONG THE SEVERAL STATES CONGRESS—SUBJECT TO THE LIMITATIONS IMPOSED BY THE CONSTITUTION UPON THE EXERCISE OF THE POWERS GRANTED—HAS PLENARY AUTHORITY OVER SUCH COMMERCE, AND MAY PROHIBIT THE CARRIAGE OF SUCH TICKETS FROM STATE TO STATE; AND THAT LEGISLATION TO THAT END, AND OF THAT CHARACTER, IS NOT INCONSISTENT WITH ANY LIMITATION OR RESTRICTION IMPOSED UPON THE EXERCISE OF THE POWERS GRANTED TO CONGRESS."

To quote again from *Hoke* vs. *United States, supra,* where the Court said:

"We may illustrate again by the Pure Food and Drugs Act. Let an article be debased by adulteration, LET IT BE MISREPRESENTED BY FALSE BRANDING, AND CONGRESS MAY EXERCISE ITS PROHIBITIVE POWER. IT MAY BE THAT CONGRESS COULD NOT PROHIBIT THE MANUFACTURE OF THE ARTICLE IN A STATE. IT MAY BE THAT CONGRESS COULD NOT PROHIBIT IN ALL OF ITS CONDITIONS ITS SALE WITHIN A STATE. BUT CONGRESS MAY PROHIBIT ITS TRANSPORTATION BETWEEN THE STATES, AND BY THAT MEANS DEFEAT THE MOTIVE AND EVILS OF ITS MANUFACTURE."

In this connection, we would call the Court's par-

ticular attention to the case of In re Heff, 197 U. S. 488, 49 L. Ed. 848, and in particular this sentence:

> "It is true the National Government exacts a license as a condition of the sale of intoxicating liquor, but that is solely for the purpose of revenue, and is no admitted exercise of the police power."

In other words, this case holds, as will be seen from the following quotation, that as an exercise of the revenue statute, the power of Congress to tax liquor may be sustained as such, but if an admitted exercise of the police power, it is clearly unconstitutional.

To quote from In re Heff:

> "We do not doubt that the construction placed by these several courts upon this section is correct, and that John Butler, at the time the defendant sold him the liquor, was a citizen of the United States and of the State of Kansas, having the benefit of, and being subject to, the laws, both civil and criminal, of that State. Under these circumstances, could the conviction of the petitioner in the Federal Court of a violation of the Act of Congress of January 30, 1897, be sustained? In this Republic there is a dual system of government, national and State. Each within its own domain is supreme, and one of the chief functions of this Court is to preserve the balance between them, protecting each in the powers it possesses, and preventing any trespass thereon by the other. The general police power is reserved to the States, subject, however, to the limitation that in its exercise the State may not trespass upon the rights and

powers vested in the general government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. AND SO FAR AS IT IS AN EXERCISE OF THE POLICE POWER IT IS WITHIN THE DOMAIN OF STATE JURISDICTION. IT IS TRUE THE NATIONAL GOVERNMENT EXACTS LICENSES AS A CONDITION OF THE SALE OF INTOXICATING LIQUORS, BUT THAT IS SOLELY FOR THE PURPOSE OF REVENUE, AND IS NO ATTEMPTED EXERCISE OF POLICE POWER. A LICENSE FROM THE UNITED STATES DOES NOT GIVE THE LICENSEE AUTHORITY TO SELL LIQUOR IN A STATE WHOSE LAWS FORBID ITS SALE, AND NEITHER DOES A LICENSE FROM A STATE TO SELL LIQUOR ENABLE THE LICENSEE TO SELL WITHOUT PAYING THE TAX AND OBTAINING THE LICENSE REQUIRED BY THE FEDERAL STATUTE. License Cases, 5 How. 504, 12 L. Ed. 256; *McGuire* vs. *Massachusetts,* 3 Wall. 387; 18 L. Ed. 165; License Tax Cases, 5 Wall. 462; 18 L. Ed. 497. NOW THE ACT OF 1897 IS NOT A REVENUE STATUTE, BUT PLAINLY A POLICE REGULATION. IT WILL NOT BE DOUBTED THAT AN ACT OF CONGRESS ATTEMPTING AS A POLICE REGULATION TO PUNISH THE SALE OF LIQUOR BY ONE CITIZEN OF A STATE TO ANOTHER WITHIN THE TERRITORIAL LIMITS OF THAT STATE WOULD BE AN INVASION OF THE STATE'S JURISDICTION, AND COULD NOT BE SUSTAINED; AND IT WOULD BE IMMATERIAL WHAT THE ANTECEDENT STATUS OF EITHER BUYER OR SELLER WAS. THERE IS IN

THESE POLICE MATTERS NO SUCH THING AS A DIVIDED SOVEREIGNTY. JURISDICTION IS VESTED ENTIRELY IN EITHER THE STATE OR THE NATION, AND NOT DIVIDED BETWEEN THE TWO."

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"In *United States* vs. *Dewitt*, 9 Wall. 41, 19 L. Ed. 593, the question was whether the 29th section of the Internal Revenue Act of March 2, 1867 (14 Stat. at L. 484, Chap. 169), which established a police regulation in respect to the mixing for sale, or the selling, of naphtha and illuminating oils, was enforceable within the limits of a State, and it was held that it was not, the Court saying (p. 45, L. Ed., p. 594):

"'As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as, for example, in the District of Columbia. Within State limits it can have no constitutional operation.'"

We would call to the Court's attention the recent case of *United States* vs. *Shauver,* 214 Fed. 155, Aug. 6, 1914, decided by District Judge Trieber.

This was a demurrer to an indictment for violation of certain regulations made by the Department of Agriculture pursuant to the following Migratory Bird Provision in the Act of March 4th, 1913, concerning the Department of Agriculture:

"All wild geese, wild swans, brant, wild ducks, snipe, plover, woodcock, rail, wild pigeons, and all other migratory game and insectivorous birds which in their northern and southern mi-

> grations pass through or do not remain permanently the entire year within the borders of any State or Territory, shall hereafter be deemed to be within the custody and protection of the Government of the United States, and shall not be destroyed or taken contrary to the regulations hereinafter provided therefor."

In holding this Act unconstitutional, the Court said:

> "It is equally well settled that as to all internal affairs the States retained their police power, which they, as sovereign nations possessed prior to the adoption of the national Constitution, and no such powers were granted to the nation. *Cooley,* Const. Lim. 574; *Patterson* vs. *Kentucky,* 97 U. S. 501, 503, 24 L. Ed. 1115; *Covington, etc., Bridge Co.* vs. *Kentucky,* 154 U. S. 204, 210, 14 Sup. Ct. 1087, 38 L. Ed. 962; *United States* vs. *Boyer,* (D. C.) 85 Fed. 425, 434."
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> "It is also claimed that it is one of those implied attributes of sovereignty in which the National Government has concurrent jurisdiction with the States; that it is a dormant right in the National Government; and, where the State is clearly incompetent to save itself, the National Government has the right to aid. To sustain the latter proposition stress is laid on the fact that it is impossible for any State to enact laws for the protection of migratory wild game, and only the National Government can do it with any fair degree of success; consequently the power must be national and vested in the Congress of the United States. A similar argument was presented to the court in *Kansas* vs. *Colorado,* 206 U. S. 46, 89, 27 Sup. Ct. 655,

664, 51 L. Ed. 956, but held untenable. Mr. Justice Brewer, speaking for the Court, disposed of it by saying:

"'But the proposition that there are legislative powers affecting the nation as a whole, which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the amendment, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the tenth amendment. This amendment, which was seemingly adopted with prescience of just such a contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that, if in the future further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that Act * * * Its principal purpose was not the distribution of power between the United States and the States, but a reservation of the people of all powers not granted.'

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"It is also argued that Congress has frequently exercised the power to regulate matter which could only have been done under the general police power, and the validity of these Acts, when attacked as beyond the power of

Congress, has been upheld. Counsel refer to the Lottery Acts, the Anti-Trust Acts, the national railway legislation, the Safety Appliance Act, the Quarantine Laws, the Pure Food and Drug Act, the White Slave Act, the Act regulating mailable articles, and other Acts of similar nature. BUT EVERY ONE OF THESE ACTS WAS UPHELD UNDER SOME PROVISION OF THE CONSTITUTION, EITHER THAT OF THE POSTOFFICE DEPARTMENT, THE COMMERCE CLAUSE, THE TAXING POWER, OR SOME OTHER GRANT. Whenever Congress or the head of a department went beyond that power, as by *including intrastate carriage with interstate,* the Acts were declared *unconstitutional.* Trade-Mark cases, 100 U. S. 82, 25 L. Ed. 550; *Illinois Central Ry. Co.* vs. *McKendree,* 203 U. S. 514, 27 Sup. Ct. 153, 51 L. Ed. 298; Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. *Butts* vs. *Merchants' Transp. Co.,* 230 U. S. 126, 33 Sup. Ct. 964, 57 L. Ed. 1422.

"It may be, as contended, on behalf of the government, that only by national legislation can migratory wild game and fish be preserved to the people, but that is not a matter for the courts. It is the people who alone can amend the Constitution to grant Congress the power to enact such legislation as they deem necessary. All the courts are authorized to do when the constitutionality of a legislative Act is questioned is to determine whether Congress, under the Constitution as it is, possesses the power to enact the legislation in controversy; their power does not extend to the matter of expediency. If Congress has not the power, the duty of the court is to declare the Act void. The court is unable to find any provision in the Constitution authorizing Congress, either expressly or by

> necessary implication, to protect or regulate the shooting of migratory wild game when in a State, and is therefore forced to the conclusion that the Act is unconstitutional."

The government points to the pure food and drugs decisions of the United States courts to sustain the constitutionality of the section involved in the case at bar. It will be our plan to cite the pure food and drug decisions bearing on the constitutionality of the opium statute, and then point out the features distinguishing those cases from the case at bar, and demonstrate that, although broad statements may have been perhaps enunciated in those cases, they were yet dicta and were not justified by the facts in the case.

As the "original package" doctrine is closely connected with these decisions, we quote here without a lengthy discussion thereof, this doctrine.

In *Vance* vs. *W. A. Vandercook Co.,* 170 U. S. 438, 42 L. Ed. 1101, the Court said here, referring to all the authorities on this principle:

> "It is also certain that the settled doctrine is that the power to ship merchandise from one State into another carries with it, as an incident, THE RIGHT IN THE RECEIVER OF THE GOODS TO SELL THEM IN THE ORIGINAL PACKAGES, ANY STATE REGULATION TO THE CONTRARY NOTWITHSTANDING; that is to say, that the goods received by interstate commerce REMAIN UNDER THE SHELTER OF THE INTERSTATE COMMERCE CLAUSE OF THE CONSTITUTION, UNTIL BY A SALE IN

THE ORIGINAL PACKAGE THEY HAVE BEEN COMMINGLED WITH THE GENERAL MASS OF PROPERTY IN THE STATE.

"This last proposition, however, whilst generally true, is no longer applicable to intoxicating liquors, since Congress, in the exercise of its lawful authority, has recognized the power of the several States to control the incidental right of sale in the original packages, of intoxicating liquors shipped into one State from another, so as to enable the States to prevent the exercise by the receiver of the accessory right of selling intoxicating liquors in the original packages except in conformity to lawful State regulations. In other words, by virtue of the Act of Congress the receiver of intoxicating liquors in one State, sent from another, can no longer assert a right to sell in defiance of the State law in the original packages, because Congress has recognized to the contrary."

We call to the Court's attention that in no single case has the Supreme Court of the United States, in spite of the many dicta to that effect, ever extended the power of Congress beyond this original package doctrine and the Supreme Court has universally held from the case of *Brown* vs. *Maryland* down to the very recent pure food and drug decisions now to be discussed, that the power of Congress only extends to merchandise in the original package and before the incorporation of such merchandise in the general mass of the property in any particular State. Bearing this important limitation universally applied by the Supreme Court of the United States to the commerce power of the

Federal Government, we turn to the pure food and drug cases relied upon by the government.

The facts in the case of *Hypolite Egg Company* vs. *United States*, 220 U. S. 45, 55 L. Ed. 365, the first case to be considered, were as follows:

> "Thomas & Clark procured the shipment of the eggs to themselves at Peoria, and, upon the receipt of them placed the shipment in their storeroom in their bakery factory along with other bakery supplies. The eggs were intended for baking purposes, and were not intended for sale in the original unbroken packages or otherwise, and were not so sold."

In its decision the Court said:

> "In the case at bar there was no sale of the articles after they were committed to interstate commerce, NOR WERE THE ORIGINAL PACKAGES BROKEN. Indeed, it might be insisted that we need go no farther than that case for the rule of decision in this. It affirms the doctrine of original packages which was expressed and illustrated in previous cases and has been expressed and illustrated in subsequent ones. It is too firmly fixed to need or even to justify further discussion, and we shall not stop to affirm or deny its application to the special contention of the egg company.
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> "The statute declares that it is one 'for preventing * * * the transportation of adulterated * * * foods * * * and for regulating traffic therein,' and, as we have seen, Sec. 2 makes the shipping of them criminal, and Sec. 10 subjects them to confiscation, and, in some cases, to destruction, so careful is the statute to prevent a defeat of its purpose. In

other words, transportation in interstate commerce is forbidden to them and in a sense they are made culpable as well as their shipper. It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and be stealthily taken out again upon arriving at their destination, and be given asylum in the mass of property of the State. CERTAINLY NOT, WHEN THEY ARE YET IN THE CONDITION IN WHICH THEY WERE TRANSPORTED TO THE STATE, OR, TO USE THE WORDS OF THE STATUTE, WHILE THEY REMAIN 'IN THE ORIGINAL, UNBROKEN PACKAGES.' IN THAT CONDITION THEY CARRY THEIR OWN IDENTIFICATION AS CONTRABAND OF LAW. WHETHER THEY MIGHT BE PURSUED BEYOND THE ORIGINAL PACKAGE *WE ARE NOT CALLED UPON TO SAY.* THAT FAR THE STATUTE PURSUED THEM, AND, WE THINK, LEGALLY PURSUED THEM, AND TO DEMONSTRATE THIS BUT LITTLE DISCUSSION IS NECESSARY.

"The statute rests, of course, upon the power of Congress to regulate interstate commerce."

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"What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of

them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce. AND APPROPRIATE MEANS TO THAT END, WHICH WE HAVE SEEN IS LEGITIMATE, ARE THE SEIZURE AND CONDEMNATION OF THE ARTICLES AT THEIR POINT OF DESTINATION IN THE ORIGINAL, UNBROKEN PACKAGES. THE SELECTION OF SUCH MEANS IS CERTAINLY WITHIN THAT BREADTH OF DISCRETION WHICH WE HAVE SAID CONGRESS POSSESSES IN THE EXECUTION OF THE POWERS CONFERRED UPON IT BY THE CONSTITUTION. *McCulloch* vs. *Maryland,* 4 Wheat. 316, 4 L. Ed. 579; Lottery Case (*Champion* vs. *Ames*), 188 U. S. 321, 355, 47 L. Ed. 492, 500, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561."

This case contains statements to the effect that Congress has the right to follow and confiscate articles prohibited from transportation in interstate commerce, even though mixed with the general mass of the property of the State. The facts in this case show, nevertheless, that the goods were in the original, unbroken packages, in which form Congress clearly had the right to confiscate. But it must be most strongly emphasized that the right to follow such contraband articles after they have become mixed with the general mass of the property in that particular State, and when no longer in the original package, assuming, although this had never been decided, that Congress has the right so to do, does not a *fortiori* give Congress power to punish a person, who holds such articles within that par-

ticular State after such article has been incorporated in the general mass of the property within the particular State, such person having had no part at all in the unlawful importation.

Assuming, for the purpose of argument, that Congress has the power to proceed *in rem* against any particular article, even though within the confines of a State, and after interstate commerce has completely ended, does not mean that Congress can legislate to punish one who merely receives or has in possession such article excluded from interstate commerce, after the importation of such article has ended and when within the confines of a particular State, such person having had no connection with the unlawful importation.

No logical reason can be adduced whereby Congress may be given the right to punish the offender from the right to follow the article *in rem,* assuming again that the right *in rem* exists although this has never been decided beyond the original package doctrine.

In *Savage* vs. *Jones,* 225 U. S. 501, 56 L. Ed. 1183, the Supreme Court, in another pure food decision, clearly recognizes the limitation of the commerce power of Congress in respect to adulterated foods, in spite of dicta to the contrary therein found.

> "This was interstate commerce, in the freedom of which from any unconstitutional burden the complainant had a direct interest. *The protection accorded to this commerce by the Federal Constitution extended to the sale by the receiver of the goods in the original packages.*

Leisy vs. *Hardin*, 135 U. S. 100, 34 L. Ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Re Rahrer*, 140 U. S. 545, 559, 560; 35 L. Ed. 572, 575, 576, 11 Sup. Ct. Rep. 865; *Plumley* vs. *Massachusetts*, 155 U. S. 461, 473, 39 L. Ed. 223, 227; 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Vance* vs. *W. A. Vandercook Co.*, 170 U. S. 438, 444, 445, 42 L. Ed. 1100, 1103, 1104, 18 Sup. Ct. Rep. 674; *Schollenberger* vs. *Pennsylvania*, 171 U. S. 1, 22-25, 43 L. Ed. 49, 57, 58, 18 Sup. Ct. Rep. 757; *Heyman* vs. *Southern R. Co.*, 203 U. S. 270, 276, 51 L. Ed. 178, 180, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130."

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"The object of the food and drugs Act is to prevent adulteration and misbranding, as therein defined. It prohibits the introduction into any State from any other State 'of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act.' The purpose is to keep such articles 'out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destinations, PROVIDED THEY REMAIN UNLOADED, UNSOLD, OR IN ORIGINAL UNBROKEN PACKAGES.' *Hipolite Egg Co.* vs. *United States*, 220 U. S. 45, 54, 55 L. Ed. 364, 366, 31 Sup. Ct. Rep. 364."

It is singular that the Court in this case, although quoting the Hipolite Egg Company case, *supra*, does not quote the dicta of Justice McKenna as to the unlimited power of the Federal Government, but perhaps advisedly quotes that portion of the opinion which is the real opinion in that case, permitting the Federal Government to confiscate the article only in

the original unbroken package, recognizing again the limitation of the Federal commerce power.

In *McDermott* vs. *Wisconsin,* 228 U. S. 115, 57 L. Ed. 755, the Court held that the State statute which compelled persons within the State to brand and label certain articles in a manner prescribed by the State law, and likewise compelling such persons to remove the Federal label, was an infringement of the commerce power of the Federal Government. The Court said:

> "That doctrine referring to the original package doctrine has been many times applied in the decisions of this Court in defining the line of demarcation which shall separate the Federal from the State authority where the sovereign power of the nation or State is involved in dealing with property. AND WHERE IT HAS BEEN FOUND NECESSARY TO DECIDE THE BOUNDARY OF FEDERAL AUTHORITY, IT HAS BEEN GENERALLY HELD THAT, WHERE GOODS PREPARED AND PACKED FOR SHIPMENT IN INTERSTATE COMMERCE ARE TRANSPORTED IN SUCH COMMERCE, AND DELIVERED TO THE CONSIGNEE, AND THE PACKAGE BY HIM SEPARATED INTO ITS COMPONENT PARTS, THE POWER OF FEDERAL REGULATION HAS CEASED AND THAT OF THE STATE MAY BE ASSERTED.
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> "For, as we have said, keeping within its Constitutional limitations of authority, Congress may determine for itself the character of the means necessary to make its purpose effec-

tual in preventing the shipment in interstate commerce of articles of a harmful character, and to this end may provide the means of inspection, examination, and seizure necessary to enforce the prohibitions of the Act, and when Sec. 2 has been violated, the Federal authority, in enforcing either Sec. 2 or Sec. 10, may follow the adulterated or misbranded article at least to the shelf of the importer.

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"To make the provisions of the Act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain 'unloaded, unsold, or in original unbroken packages.' "

In *Shawnee Milling Company* vs. *Temple,* 179 Fed. 522, the Court said:

"No one should doubt but that legislation by Congress can control the interstate subject of commerce for a time at least, and then the State by a police regulation can control."

In *United States* vs. *Sixty-five Casks of Liquid Extract,* 170 Fed. 455, the Court said:

"Congress had no power except in the District of Columbia and the Territories to prohibit one from manufacturing adulterated food and drug products; it had no power to prevent one anywhere from personally consuming such products; it did have power to suppress the manufacture of such in the District of Columbia and the Territories, and by this Act has done so; it had the further power to restrict in the course

> of commerce the transportation from State to State of such products, and it has done so; it had power, after such product was received from another State, to restrict its sale in the original package, and it has done so."

In *Philadelphia Pickling Co.* vs. *United States,* 202 Fed. 152, the Court said:

> "The Act has two clearly separate objects (220 U. S. 54, 31 Sup. Ct. 364, 55 L. Ed. 364): First, to keep adulterated articles completely out of the channels of interstate commerce; and, second, if they do enter such channels, to sanction their condemnation while being transported, or even after they have reached their destination, as long as they remain unloaded, unsold, or in original unbroken packages."

These cases, as stated above, although containing dicta to the effect that Congress has the right to follow the article, irrespective of its incorporation in the general mass of the property of the country, are not cases in which the facts warrant this rule of law, and are all cases which, recognize that Congress has the right to act on interstate commerce only to a certain point. But, assuming that Congress had the right to confiscate the article, it does not necessarily follow, as stated above, that Congress would likewise have the right to punish the offender, for although the articles are excluded from commerce, the person is not. We are, of course, limiting our reasoning to articles incorporated within the general mass of property within any particular State, and after interstate commerce has completely ended, and also

bearing in mind that we are endeavoring to punish the offender who merely knowingly holds such article after incorporation in the general mass of the property within any particular State, having had no connection with the unlawful importation.

Take, for instance, the example of a San Francisco housewife. Adulterated food has been shipped through the mail and is placed upon the shelves of Goldberg, Bowen & Co., of San Francisco, who know it to be adulterated; they sell it to a San Francisco housewife, who likewise knows it to be adulterated; and she uses the food in preparation of the evening meal. Would the United States marshal have the right to come into that woman's home, providing there was a statute to this effect, and arrest her for violating the Federal law because of the fact that she knew that she was using adulterated food? This is what this opium statute amounts to. From none of these pure food cases can this conclusion be derived.

We would call the Court's attention here, without quoting verbatim, to the provisions of the Pure Food Act, Act of June 30, 1906, 34 Stat. at L. 78; section I of said Pure Food and Drug Act, Congress prohibits the sale or manufacture of adulterated food in the District of Columbia, or any territory of the United States, but does not endeavor to legislate in those respects as to any particular State. In Section II and Section X of said Act, Congress enacts that any adulterated food *"which is being transported"* in interstate commerce may be subject to confiscation, and then enacts that *"hav-*

ing been transported" and within any particular State and *"remaining unloaded, unsold or in the original package,"* it is subject to confiscation. Thus it is so palpably obvious that Congress realized that, after the interstate transportation had ended and the food or drug was within the confines of any particular State, there was a limitation upon the power of the Federal authorities and Congress as to that particular food or drug. If this were not true, Congress would have merely stated that these articles "while being transported, or having been transported, through interstate commerce" were subject to the control of the Federal Government. But, as pointed out above, we do not find this broad phrase but, on the other hand, a fine distinction being made by Congress in the Pure Food and Drug Act for the purpose of saving the Act from the condemnation of unconstitutionality, such as caused the Supreme Court to declare the Employers' Liability Act unconstitutional. To reiterate, Congress distinguishes clearly where the goods are in the course of transportation in interstate commerce, and where they have been transported, and admits, by a qualification of its own power, that where they have been transported and are within any particular State, they are subject to congressional legislation only before incorporation into the general mass of the property of a particular State and before interstate commerce therein has ended. Again, we must emphasize the distinction between the right of Congress to follow an article and to punish the person holding

such contraband article of commerce, within the particular State.

Thus the conclusion is irresistibly borne upon us that the section of the Opium Statute here in question is unconstitutional in that it is an assumption by Congress of the police power reserved to the States, and in that it applies without qualification to both intra- and interstate commerce, and is so interblended in its application to such commerce as to be indivisible. Thus the duty rests upon this court to declare the entire section, herein involved, unconstitutional; but, if the Court should feel this Act not in toto unconstitutional, but only partially so, then this judgment must nevertheless be reversed because the evidence clearly shows that the Act is unconstitutional as to the alleged offense in the indictment.

Once again cautioning the Court to bear in mind that the right to follow the opium, after its identity has been lost in the general mass of the property of the State (although the Supreme Court of the United States has never given Congress this right), has no bearing upon the right of Congress to legislate against persons merely holding such goods within the confines of the State, after the transportation in interstate or foreign commerce has completely ended, and where the person holding such opium is in no wise connected with the unlawful importation thereof. The mere fact of the knowledge of such unlawful importation is insufficient to create jurisdiction where, without such knowledge, Con-

gress under the Constitution would have no such power.

WHEREFORE, Plaintiff in Error, because of prejudicial error appearing in the record, asks this prejudicial error appearing in the record, asks that the judgment be reversed.

Respectfully submitted,

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